Office - Supreme Court, U.S.
FILED
AUG 19 1982
ALEXANDER L. STEVAS,
CLERK

82-301

No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

SOLARGEN ELECTRIC MOTOR CAR CORP.,
and SOLARGEN ELECTRONICS, LTD.,

Petitioners,

—against—

GENERAL MOTORS CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STEVEN J. ROMER
Counsel for Petitioners
18 East 48th Street
New York, New York 10017
(212) 753-3400

STEVEN J. ROMER
EVELYN F. COHN
Of Counsel

Questions Involved

1. Is it a violation of §§1 and 2 of the Sherman Act, or a pre-marketing disclosure device comparable to that established by the Second Circuit in *Berkey* v. *Kodak* to be permissible, if not required, under the Sherman Act, for a monopolist to issue a nationwide press release announcing a technological breakthrough and the dissemination of electric motor cars, six or more years in the future, where such announcement is false, is made to preempt the announcement by a small electric car company of its revolutionary Lead-Crystal Battery and its intent to *immediately* market electric vehicles, and in fact precludes such electric car company from entering the market?

2. a) May the Second Circuit reverse, *sua sponte*, a finding of the District Court, not clearly erroneous, that the relevant market has been sufficiently defined to state a cause of action for violation of §§1 and 2 of the Sherman Act? and b) Since there is a conflict between the Second and Ninth Circuits as to whether relevant market need be defined at all to sustain a violation under §2 of the Sherman Act, should not such conflict be resolved, at this time, by this Court?

3. Is it a violation of §§1 and 2 of the Sherman Act, for a competitor to illicitly secure copies of patent applications, several months *before* their issuance and public availability and to commence reproduction of the patented technology?

4. Have Petitioners raised the inference of a combination and conspiracy in violation of the Sherman Anti-Trust Act, sufficient to preclude summary judgment, and to entitle Petitioners to their constitutional right to a trial by jury, where the anti-competitive actions of a co-conspirator are established to be inconsistent with its economic self-interest and legitimate commercial objectives?

5. May summary judgment be granted on the ground that allegations of intentional destruction of Petitioners' business and

a conspiracy to effect such result "lack even a modicum of evidentiary support to justify the expense . . . of going to trial"* where *documents produced by Respondent* and its commercial espionage agent, disclose that it surreptitiously monitored Petitioners' activities, engaged in illicit commercial espionage and once again employed "Nader like" dirty tricks?

6. May summary judgment be granted on the ground that allegations of breach of contract by Defendants American Motors Corporation and American Motors Sales Corporation (hereinafter "AMC"), and inducement of said breach by Respondent, "lack even a modicum of evidentiary support to justify the expense . . . of going to trial"* where the court chooses to ignore an *executed letter of intent* manifesting the terms of said contract and the *signed contract* itself, as well as other unrefuted testimony offered by Petitioners to establish a contract, and instead accepts the unsupported, self-serving denials of AMC and the Respondent?

*Excerpt from the decision of District Court, Carter, J. at Appendix A.

TABLE OF CONTENTS

	PAGE
QUESTIONS INVOLVED	i
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
PARTIES	2
CORPORATE DISCLOSURE	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	20
APPENDIX A:	
Opinion of the District Court	1a
Opinion of the Court of Appeals	8a
APPENDIX B:	
Section 1 of the Sherman Anti-Trust Act	11a
Section 2 of the Sherman Anti-Trust Act	12a
Section 4 of the Clayton Anti-Trust Act	12a

TABLE OF CASES

American Tobacco Company v. *United States*, 147 F.2d 93, *Aff'd*, 328 U.S. 781 (1946)	12
Bailey's Bakery, Ltd. v. *Continental Baking Co.*, 235 F. Supp. 705 (D. Hawaii 1964), *aff'd.* per curiam, 401 F.2d 182 (9th Cir. 1968), cert. denied, 393 U.S. 1086, reh. denied 394 U.S. 967 (1969)	13

Berkey Photo, Inc. v. *Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980) 12, 13, 17

FTC v. *Proctor & Gamble Co.*, 386 U.S. 568 (1967) 13

Kirihara v. *Bendix Corp.*, 306 F. Supp. 72 (D. Hawaii 1969) 13

Lessig v. *Tidewater Co.*, 327 F.2d 459 (9th Cir.), reh. denied, 327 F.2d 478 (9th Cir.), cert. denied, 377 U.S. 993 (1964) 17

Oreck v. *Whirlpool*, 639 F.2d 75 (2d Cir. 1980), cert. denied, 102 S.Ct. 639 (1982) 19

Pinder v. *Hudgins Fish Co., Inc.*, 570 F.2d 1209 (5th Cir. 1978) 16

Poller v. *Columbia Broadcasting System*, 368 U.S. 464 (1962) 18

Sargent-Welch Scientific Co. v. *Ventron Corp.*, 567 F.2d 701 (7th Cir. 1977), cert. denied, 439 U.S. 822 (1978) 12

United States v. *Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1946) 12

United States v. *Diebold*, 369 U.S. 654 (1962) 18

United States v. *Morgan*, 118 F. Supp. 621 (S.D.N.Y. 1953) 18

United States v. *Pfizer & Co.*, 245 F. Supp. 737 (E.D.N.Y. 1965) 17

TABLE OF AUTHORITIES

Section 1 of the Sherman Act 2, 9, 16

Section 2 of the Sherman Act 2, 9, 16

Section 4 of the Clayton Act 2

IN THE

Supreme Court of the United States

SOLARGEN ELECTRIC MOTOR CAR CORP.,
and SOLARGEN ELECTRONICS, LTD.,

Petitioners,

—against—

GENERAL MOTORS CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Solargen Electric Motor Car Corp., and Solargen Electronics, Ltd., petitioners, pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on May 21, 1982.

Opinions Below

The opinion of the District Court is reported in 1981-82 CCH Trade Cas. ¶64, 299 (S.D.N.Y. 1981). It is also printed in Appendix A.

The Decision and Order of the Court of Appeals was entered on May 21, 1982. A copy of the decision and order is printed in Appendix A.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to the Act of June 25, 1948, c. 646(1), 62 Stat. 928(1), 28 U.S.C. §1254(1).

Statutes Involved

The statutory provisions involved are Sections 1 and 2 of the Sherman Act of July 2, 1890, c. 647 §§1 and 2, 26 Stat. 209, 15 U.S.C. §§1 and 2; and Section 4 of the Clayton Act of October 15, 1914, c. 323, §4, 38 Stat. 731, 15 U.S.C. §15. They are printed in Appendix B.

Parties

Following the determination of the District Court, a settlement agreement was entered into between Petitioners and AMC, and this action was discontinued as against them.

Corporate Disclosure

Solargen Electronics, Ltd. is a privately held company all of whose shares of stock are owned by its President, Steven J. Romer, and his relatives, clients and close friends. It wholly owns its four subsidiaries, Solargen Electric Motor Car Corp., Solargen Capital, Inc., Old Town Springs Development Corp. and Waterside Ventures, Inc.

Statement of the Case

Petitioners were established in 1976 and in 1979 respectively, to develop, market, and distribute the Solargen Electric Motor Car, and its revolutionary Lead-Crystal Battery technology, for which patent applications were filed in the United States and in thirty-one other countries.* It is projected that the average bat-

*The first U.S. patent, issued February 20, 1979, contains twenty-one *method* claims relating to the making of lead-crystal storage cells and batteries, and storage devices made therefrom. The second U.S. patent, issued March 6, 1979, contains twenty-two *product and composition* claims with respect to lead-crystal storage cells and batteries, and devices made therefrom. Patents have already been issued in most countries, and in no country has a patent application been rejected.

tery-pack in an electric vehicle can be recharged in approximately six minutes, and an electric car will have a 150 mile range between rechargings, with a 72 m.p.h. maximum speed. When fully developed and marketed, this patented technology will render an electric motor car competitive with traditional internal combustion engine vehicles using gasoline or diesel fuel.

During 1977 and 1978, Petitioners established a marketing organization to disseminate the Solargen Electric Motor Car. Plant facilities aggregating 125,000 square feet were acquired at which the Solargen Electric Motor Car would be developed, manufactured and assembled. In August 1979, Petitioners discerned the existence of a massive conspiracy to impede their progress, directly attributable to behind-the-scenes efforts engaged in and funded by Respondent General Motors. The events giving rise to this conclusion were so extraordinary that between August 22, 1979 and September 6, 1979, Petitioners' president, Steven J. Romer, recorded such events in eight *confidential* memoranda to his file.* (266a-287a).** The effects were so devastating, that the Petitioners were forced to close their plant and terminate the Dealership and Distributorship program during December 1979.

The acts which form the basis for the instant action include: (a) coercing, cajoling, and pressuring the Chairman of the Board of AMC to unreasonably delay shipment of bodies and chassis, referred to as "gliders" and to increase the per unit price to $4,593.90 in breach of AMC's contract with Petitioners for the sale of between 3,000 and 18,000 gliders at $3,000 per unit, entered into July 27, 1979; (b) inducing numerous banks and suppliers of Petitioners to refrain from dealing with Petitioners; (c) engaging in such "dirty tricks" as commercial espionage, wire-tapping, eavesdropping, and bribing Stanley Caulder, the

*These memoranda were produced pursuant to Court order during December 1980, *before* any discovery of the Respondent and before Petitioners learned of the existence of Respondent's commercial espionage agent, Robert A. Keyes.

**References are to Joint Appendix, excerpts of which are reprinted in Appendix C.

scientist who reviewed the Solargen patents, and Herbert Weisbaum, the news reporter who interviewed Caulder, in preparation of a false and defamatory broadcast relating to Petitioners; and (d) creating a national pseudo-event, seventy-two hours prior to "permitting" AMC to execute a revised, highly unfavorable second contract with Petitioners, to wit: a false and predatory national news release on September 25, 1979, announcing that Respondent General Motors would be manufacturing and distributing an electric car between 1985 and 1990, and that no electric car would be feasible before then.

At the inception of this litigation Respondent "could not fathom" any basis for being named a defendant in this lawsuit and disclaimed any knowledge of Petitioners. Following two days of depositions of Petitioners' president, Respondent moved to stay its deposition pending its "planned" motion for summary judgment, and to compel Petitioners to "name names" withheld to protect such persons from harassment by Respondent. In granting Respondent's motion, the court below stated: ". . . *plaintiffs intend to use discovery in an attempt to concretize support for the basic allegations in the complaint. This will not be allowed*". (Memo Endorsement dated 11/25/80). After answering all questions posed by Respondent during four days of depositions, Petitioners were permitted limited discovery* which resulted in the production of documents establishing Respondent General Motors as the master puppeteer controlling and manipulating those within its extensive sphere of influence.

The following evidentiary facts, as a minimum, give rise to an inference that Respondent played a pivotal role in the destruction of Petitioners as a viable electric car manufacturer, and preclude summary judgment:

---

*The only motion to quash a subpoena denied in this case was heard by the Hon. Howard G. Munson, Presiding Judge of the United States District Court for the Northern District of New York, 506 F. Supp. 546 (N.D.N.Y. 1981), and resulted in the discovery of the $10,000.00 bribe paid to WSYR news reporter Herbert Weisbaum. (401a, 402a).

1. Respondent admits that in December of 1978, several months *before* the Solargen Lead-Crystal Battery patents were issued, it began working on Petitioners' battery. (158a, 168a, 170a, 179a). At least 40 engineers and scientists, in different divisions and departments of Respondent General Motors worked on the Solargen battery and produced at least two prototypes. (157a-170a, 178a, 179a, 335a-344a, 532a-542a).

2. Respondent engaged Robert A. Keyes, a consulting firm of one whose only clients are Respondent General Motors' Delco Remy Division, and Respondent's British affiliate, Lucas Industries, Ltd., to monitor Petitioners' activities. Using electronic eavesdropping and surveillance equipment, Respondent learned of planned meetings between Petitioners and potential suppliers, and repeatedly pressured such suppliers to refuse to deal with the Petitioners. (199a, 217a-223a, 265a, 370a-383a, 698a, 701a, 702a, 792a, 826a-832a, 1219a, 1249a, 1250a-1254a). Keyes kept Respondent apprised of its success by reporting "cancelled" meetings, as they occurred; he insured Respondent's success by reporting conversations between Petitioners' president and suppliers, as well as between Petitioners' president and a government official, Dr. Mike Yao. (890a).

3. On July 27, 1979, AMC agreed to sell to Petitioners at least 3,000 gliders at $3,000.00 per unit. The following day, a letter of intent previously prepared and signed by Petitioners was signed by AMC. (789a-791a). A final draft of a "more formal" contract was signed by Thomas A. Staudt, AMC's Marketing Vice President (the only officer whose signature was required to bind AMC) on August 14, 1979, in contemplation of the public announcement and "ceremonial signing." (709a, 807a-809a).

4. On August 10, 1979, the Washington Star printed an article entitled "Wheels." It described Petitioner's Lead-Crystal Battery, and announced that "the prototype car . . . will be the American Motors Concord DL wagon, tentatively priced at about $9,100.00." In the ensuing days the article was circulated amongst

Respondent General Motors' top management, including the President, Elliott M. Estes. (335a-338a).

5. Abruptly, on or about August 15, 1979, AMC cancelled the scheduled "ceremonial signing." AMC's Chairman of the Board, Gerald Meyers, whose approval, according to AMC's Intra-Company Correspondence "approval list" dated July 31, 1979, was neither required nor contemplated, suddenly became involved in the "operations" decision, and refused to permit the *signed* contract to leave his desk. (668a-683a).

6. Thereafter, between August 24, 1979 and October 1, 1979, AMC, in contravention of its economic interest in consummating the largest sale of component parts in its history, compelled Petitioners to perform numerous unnecessary "tests," not previously required, and to comply with new "requirements," for the sole purpose of delaying performance of the contract.

7. On September 10, 1979, at a dinner meeting between Steven J. Romer and Bryan Eagle of Petitioners and William Bain and Robert Swaim of AMC, Swaim handed Romer a letter dated August 31, 1979, *not previously mailed*, announcing *for the first time* an increase in the price of gliders from $3,000 to $4,593.90 per unit (a 54% price increase). Swaim testified that the only price discussed to that date was $3,000 and that he handed the letter to Romer, after they had had a few drinks, because "[Romer] would not be happy with the price as quoted due to [his] continued indications over the course of our previous discussions, . . . that [he] had hoped to eventually end up with a base unit price in the area of $3,000.00 . . ." (801a).

8. On September 25, 1979, Respondent General Motors caused the issuance of a nationwide news release announcing that it had made a technological breakthrough which would enable it to produce electric cars for mass consumption some time between 1985 and 1990, and that no electric car would be feasible before then. The purpose of this false announcement was to preempt and negate the impact of a similar announcement by Petitioners seventy-two hours later. (549a, 550a).

9. Respondent had not made a "breakthrough" in battery technology at the time it made its nation-wide announcement. According to Keyes, Respondent's commercial espionage agent, Dr. D. Bruce Merrifield, Vice-President, Technical, Continental Group, quoted his Chairman, Robert S. Hatfield, who is also *a member of the Board of Directors of Respondent General Motors*, as stating:

> "The G.M. Ni Zn Battery is good enough to use as a way of designing and developing all the other systems that go into an EV (Electric Vehicle). *G.M.'s purpose is to get a lot of good P.R., get a lot of people off their necks who are saying that the automobile companies are resisting new technology, etc., as well as influence the CAFE (Corporate Average Fuel Economy) situation in Congress. However, G.M. does not expect the Ni Zn Battery to be in that electric car for any long period of time, if at all.*" (Emphasis added) (390a).

William Wylam, Chief Engineer for nickel-zinc Batteries, and Martin Caserio, Assistant to the President, admitted that at the time the breakthrough was announced "there was no production concept for a vehicle . . ." and "there was no vehicle design developed . . .", and there was no basis for the announcement.

10. In August 1979, Petitioners learned that WSYR Television intended to air, nation-wide, a false "documentary" defaming Petitioners, that the station's news reporter, Herbert Weisbaum had received $10,000.00 from Respondent as an inducement to prepare the libelous broadcast, using hidden microphones, and that the scientist who reviewed Petitioners' patents, Stanley Caulder, also received between $50,000 and $100,000.* (156a, 204a-217a, 266a-275a, 347a-357a, 359a-364a, 369a, 401a-402a).

---

*In early 1979, WSYR's reporter arranged with Petitioners to visit its plant and prepared a highly favorable report. The negative newscast prepared in June/July of 1979 involved a second surreptitious visit using *hidden microphones*. (205a).

11. When deposed, Weisbaum testified that he did not have the "faintest idea" of the source of the funds used to purchase a $10,000 certificate of deposit acquired precisely within the time frame that Petitioners asserted he was bribed by Respondent General Motors, and no document was produced indicating a withdrawal of $10,000 on the date the certificate of deposit was purchased. (1318a, 1320a-1325a). Incredibly, one week later, a photocopy of one of the bank statements produced by Weisbaum at his deposition was attached to his deposition transcript, indicating the alibi of a $10,000 withdrawal on the day the certificate of deposit was purchased. Petitioners' attorneys prepared affidavits swearing that the photocopy was a fabrication. Not one of the five attorneys representing Respondent, AMC and Weisbaum, present at the deposition, has ever come forward to state that the photocopies were true copies!

12. Stanley Caulder, a scientist employed by International Lead Zinc Research Organization (ILZRO"),* working at the United States Naval Laboratories, reviewed Petitioners' patents at the request of William Webster of the Department of Energy. WSYR reporter Weisbaum "fortuitously" stumbled upon Caulder and arranged an interview. Solely on the basis of his review of Petitioners' patents, Caulder made numerous negative statements as to the performance capabilities of the Lead-Crystal Battery. These conclusions were devoid of scientific basis in that Caulder, during his deposition, admitted that no determination could be made without observing battery tests, and for this reason, his televised conclusions were never included in his report to the Department of Energy. (205a-217a, 1163a-1167a).

13. Weisbaum, Caulder and Respondent denied contact with each other; however, Keyes "reports" are permeated with their names, and Keyes was personally relieved when his name was not mentioned by either Caulder or Weisbaum during their respective depositions. (207a, 208a, 214a-217a, 383a, 395a, 399a).

*ILZRO is a private non-profit research institution which relies totally upon grants from various corporations such as Exxon Enterprises (399a) and probably Respondent General Motors.

In granting Respondent's motion for summary judgment, the District Court stated: "plaintiffs' suspicions are fueled primarily by a document in which a GM employee referred to Keyes' apparent relief that his name had not come up in a certain meeting. While this may titillate those prone to suspicion, it does not by itself justify going to trial on allegations of commercial espionage." Considered together with the "totality of proof" advanced, it does! The "GM employee" was Paul Yestrumskas, one of Respondent's attorneys, and the "certain meeting" was the depositions of Weisbaum and Caulder. Keyes' relief that his name had not been mentioned was not meaningless. It raises the inference that he knew of, or was involved in, Respondent's bribes and practices, violative of the Sherman Act.

The District Court (Carter, J.) granted summary judgment against Petitioners, finding: "While most[3] of Solargen's allegations against General Motors would be actionable if supported factually, they lack even a modicum of evidentiary support to justify the expense . . . of going to trial." Footnote 3, referred to in the excerpted portion of the District Court decision, states:

> "Solargen's allegation that G.M. knowingly exaggerated the success of its experimental battery program to the public does not constitute a valid cause of action that Solargen has standing to bring. In addition, these allegations, like the others in the complaint, are factually unsupported."

The Court of Appeals (Judges Timbers, Van Graafeiland and Kearse) heard arguments on May 20, 1982, and on May 21, 1982 affirmed the judgment of the District Court, without opinion.

Reasons for Granting the Writ

First: The Courts below have held, as a matter of law, that false, predatory pre-marketing advertising by a monopolist, does not constitute a violation of Sections 1 and 2 of the Sherman Act. The preclusion of competition by preemptive advertising, de-

signed to negate the impact of the declaration of a competitor of its intended immediate entry into the market place, is no less effective than traditional means of foreclosing developing technology, antithetical to the economic interests of entities profiting from the status quo. It is an important question never considered by this Court. In the instant matter, the American public has suffered tremendously by Respondent's prohibition of the development of the electric car, which has resulted in forced dependence on internal combustion engine vehicles fueled by gasoline and diesel, and in turn, upon Oil Producing and Exporting Countries. Respondent has betrayed and deceived not only the American public, but Congress as well.

Recognizing that Petitioners' battery would revolutionize the automobile industry, Respondent set out to sabotage Petitioners, through the surreptitious acquisition of Petitioners' technology and patents, "preventive" advertising, "Nader like"* dirty tricks such as wiretapping and eavesdropping enabling it to frustrate Petitioners' ability to enter into contracts with suppliers, inducing malicious and unfounded broadcasts on nation-wide television, and pressuring the Chairman of the Board of AMC to breach its first contract with Petitioners and to delay entry into a second, more onerous contract.

Several days before Petitioners and AMC were to announce

*John Z. DeLorean, a former G.M. executive recently wrote *On a Clear Day You Can See General Motors*. At p. 51 he states: "Under Donner-Roche, a combination of Donner's arrogance and Roche's willingness to go along with the boss, led to two of the most embarrassing public relations blunders in the corporation's history.

"First, in 1965, Donner abominably performed before Senator Abraham Ribicoff's subcommittee on executive reorganization. He refused to or could not answer the simplest of questions about G.M.'s operation and financial performance.

"Second, was the whole sordid episode in which the company tailed Ralph Nader. Roche apologized to Nader, to Congress and the country for the incident and G.M. paid $425,000.00 in damages in an out-of-court settlement with the consumer advocate." (1158a, 1161a).

At his deposition, Respondent's Assistant to the President, Martin J. Caserio, admitted the truth of the statement. (1162a).

their agreement, G.M. "leaked" the following story to the media:

> "Details on just how dramatic a breakthrough GM has made with the zinc-nickel oxide battery is unclear. But earlier this year in laboratory tests GM was able to achieve 500 charge-discharge cycles with nickel oxide electrodes. Tops for a lead acid battery is about 400 charge-discharge cycles even when it is almost fully discharged each time."

The statement was false when made. According to Dr. D. Bruce Merrifield, Vice President of Technology at the Continental Group, the life cycle of the nickel-zinc oxide battery is poor. Poor being defined as "anything less than 500 [cycles]." (1301a-1303a). According to William B. Wylam, ". . . at the time of the public announcement in 1979 we were achieving something like 250 cycles", laboratory cycles, not cycles based on actual incorporation of the battery into a motor vehicle, and the two might not have any correlation. This was hardly a "breakthrough" warranting banner headlines. Japan has been incorporating nickel-zinc batteries achieving 500 life cycles, in a demonstration program using vehicles, since September of 1978. The miraculous breakthrough heralded throughout the nation was sham. There was no breakthrough. There was no electric vehicle contemplated. Contrary to its representations to Congress, Respondent has not actively promoted the development of an electric car. It has utilized its Olympian power to impede its development, and has frustrated countless small electric car companies such as Petitioners. *The absence of electric cars on the roads is a tribute to Respondent's success,* not to a lack of American ingenuity. *Its perpetuity was insured May 21, 1982, the day the Second Circuit issued an order affirming the decision of the District Court, and Respondent issued a news release announcing its determination not to market electric cars between 1985-1990, if ever!*

According to Respondents' annual report and S.E.C. filings, its income from automobile sales, in the U.S. alone, in 1979, exceeded 51 billion dollars, or 44-45% of the U.S. market includ-

ing imports.* Excluding imports it soars to 57%. Its power to control the market is illustrated by its sales to AMC of 162.5 million dollars in parts, an enormous factor since AMC's sales of 3.12 billion dollars reflects only 2-3% of the market. (473a). These statistics establish Respondent's monopoly in the automobile industry. *American Tobacco Company* v. *United States*, 147 F.2d 93, 112, *Aff'd*, 328 U.S. 781 (1946).

Respondent has abused its monopoly power in the automobile industry to preclude *any* competitors from manufacturing and selling electric vehicles which will compete with traditional internal combustion vehicles. This abuse violates the Sherman Anti-Trust Act. *United States* v. *Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945); *Sargent-Welch Scientific Co.* v. *Ventron Corp.*, 567 F.2d 701 (7th Cir. 1977), cert. denied, 439 U.S. 822 (1981).

The predisclosure issue here presented reflects the danger foreseen by Justices Blackmun, Rehnquist and Powell, who would have granted certiorari in *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 444 U.S. 1093 (1980). In the dissenting opinion of Mr. Justices Rehnquist and Powell, it is stated at 1095:

> "If the Sherman Act requires 'predisclosure' by one competitor to another before a new product can be marketed, I think that the raised eyebrows resulting from such a holding should come from this Court, and not from extrapolations by other federal courts of the decisions of this Court, interpreting the Sherman Act . . .
>
> So long as there are institutes for federal judges concern-

*According to 10-K reports and annual reports filed by the leading automotive companies, the percentage of sales of automobiles in the United States, including imports, for 1978, differing only slightly from 1979, broke down approximately as follows:

General Motors	—	46%
Ford	—	23.6%
Chrysler	—	11.1%
American Motors	—	1.9%
Foreign Imports	—	17.4%

ing the management of complex cases, and judicial panels for handling multi-district litigation, this Court cannot remain wholly above the battle."

Is the predatory predisclosure of Respondent to be shielded by the Second Circuit's interpretation of the Sherman Act in *Kodak*? Or, as Justices Rehnquist and Powell urge, should not the parameters of predisclosure be *considered and resolved by this Court*?

Respondent's announcement was calculated to negate the announcement by Petitioners of its own battery breakthrough, its contract with AMC, and the imminent production of electric vehicles. The intended effect was to induce consumers to wait for Respondent rather than risk purchasing from an unknown. It was predatory in that it was totally unfounded and timed to frustrate Petitioners' immediate plans to distribute electric vehicles on a mass scale. See, *Bailey's Bakery, Ltd.* v. *Continental Baking Co.*, 235 F. Supp. 705 (D. Hawaii 1964), *aff'd.* per curiam, 401 F.2d 182 (9th Cir. 1968), cert. denied, 393 U.S. 1086, reh. denied, 394 U.S. 967 (1969).*

The banner headline news coverage Respondent was able to command, is the functional equivalent of expending "excessive advertising costs for the purpose of destroying competition," a practice condemned in *Bailey's Bakery, Ltd.* v. *Continental Baking Co., supra. See, FTC* v. *Proctor & Gamble Co.*, 386 U.S. 568, 577 (1967) (advertising as an anti-competitive weapon).**

Second: The Court below, during oral argument, improperly rejected, as a fraudulent practice and as an Anti-Trust violation,

*Overruled on other grounds in *Kirihara* v. *Bendix Corp.*, 306 F. Supp. 72 (D. Hawaii 1969).

**Respondent's predatory announcement constitutes the first time ever, in the history of the automotive industry, that an automobile manufacturer has announced any proposed plan, six to ten years in advance. During depositions, Respondent could not name a single instance where it advised the world of a major projected plan even a few years prior, let alone six to ten years prior.

Respondent's acquisition of Petitioners' patents prior to their issuance, and its use of a commercial espionage agent to secure trade secrets. The quintessential trade secret, is a patent *prior* to its issuance. To permit a competitor to clandestinely secure same with impunity, is to condone a practice whose only purpose can be anti-competitive, and violative of the spirit and purpose of the Anti-Trust laws.

The Courts below erroneously foreclosed jury consideration of the impact of Respondent's piracy and commercial espionage activities. They precluded a jury from concluding, on the basis of competing inferences, that the intent and result of Respondent's actions were anti-competitive and in violation of the Sherman Act.

A jury was precluded from drawing inferences of conspiracy from the following fruits of Keyes "consultative" endeavors:

(a) *March 16th, 1979 Memorandum*: (370a) ". . . if I can without creating problems with the Romers, I will *contract* one of the inventors." (emphasis added).

(b) *March 28th, 1979 Memorandum*: (372a-375a) "Before March 6th when the second U.S. Patent was granted, Steve was not discussing any details except to the three companies that signed confidentiality agreements: Federal Express, International Patent, and Gulf & Western . . . John W. Rowan at Gulf & Western looked at the Solargen cell . . . G & W did not buy the Romer package* . . . *The battery concept warrants a serious look based on some work from the patent.*"**

*The detailed and accurate information amassed in this memorandum was *not* furnished to Keyes by the Petitioners during the meeting with the Romers which resulted from Keyes' feigned interest in purchasing a dealership.

**Note that only days after the issuance of the Solargen patents, and during a period when copies of such patents were absolutely *unavailable* from the patent office, from the government printing office, or from any other sources, Respondent had already performed sufficient experimental work on Petitioners' battery to determine that it warranted serious consideration.

(c) *September 7th, 1979 Memorandum*: (890a) "On September 5th, Mike Yao phoned Steve Romer in NYC about the Solargen battery, offering to test it at the NBTL. Steve said that he would be happy to send a cell module or two in several weeks." (Dr. Mike Yao heads the battery development division of the U.S. Department of Energy and is stationed at the Argonne Laboratory.)

(d) *September 26th, 1979 Memorandum*: (378a) "Steve Romer set up a September 5th visit to ESB but then postponed it, according to Tom Farrell . . . In June the RSR President received a letter from Solargen with some promotional literature on the battery . . . Dave is going to phone Steve Romer to see what information can be gleaned for me."

Initially Petitioners planned to use traditional lead-acid batteries until Lead-Crystal Batteries became available for incorporation in the Solargen Electric Vehicles. Such batteries were to be supplied by Globe Union Battery Company, Electric Storage Battery Company ("ESB"), General Battery Company, and/or Varta Battery Company. Repeatedly, without reason, and contrary to their economic interests, each supplier having Respondent as a major customer, abruptly cancelled appointments made with Petitioners. (217a-223a, 273a, 274a, 285a, 286a). One event, documented in Romer's September 6, 1979 Confidential Memo involved ESB and a meeting scheduled for September 5, 1979 in Yardley, Pennsylvania. Upon arriving in Yardley, Romer telephoned stating he would be a few minutes late. He thereupon learned that those with whom he was to meet would not be available and that their "replacements" were likewise unavailable, but that someone would meet him to "take notes" on his proposal. Recognizing that once again Respondent was a step ahead, Romer cancelled the meeting. (285a-286a). Keyes recorded the event in his September 26, 1979 memo, (378a), and admitted contact with ESB personnel and other battery suppliers of Petitioners. (1249a-1254a).

Respondent's ability to interfere with Petitioners' potential sup-

pliers stems from its monopoly position and the fact that it is a major supplier of certain components and major user of others. Companies such as ESB, General Battery, etc. do tremendous business with Respondent, which they cannot afford to forego. AMC is similarly dependent upon Respondent. (473a).

On August 6, 1981, Keyes signed an affidavit prepared by Respondent, denying that Respondent maintained a pipeline into Petitioners' activities. (474a-478a). In a memo he states "I never got a clear answer as to why the affidavit was needed. Geo. finds nothing offensive in the affidavit. It really does not say anything. So go ahead and sign it." When pressed at his deposition, he testified the affidavit was based on "ignorance." The affidavit was not included in Respondent's motion for Summary Judgment, although expressly prepared for such purpose.

Third: Utilizing the revolutionary Lead-Crystal Battery, rechargeable in six minutes, the Solargen Electric Motor Car would have been competitive with the traditional internal combustion engine vehicle. Hence, the relevant market is the national automobile market. Because of its novelty, and economical performance, the electric car would not necessarily compete only with comparably priced internal combustion engine vehicles; certainly, as the first mass-marketed electric car manufacturer, Petitioners would not initially, be competing with the few electric cars presently available on a limited basis. At this time there is no electric car "submarket."

The District Court held that Petitioners had stated a cause of action for violation of the Sherman Act, and by implication, that a relevant market had been sufficiently alleged. This fact determination was not clearly erroneous and therefore should not have been reversed by the Second Circuit. *Pinder* v. *Hudgins Fish Co., Inc.*, 570 F.2d 1209 (5th Cir. 1978).

Respondent's actions are classically anti-competitive and violative of Sections 1 and 2 of the Sherman Act, even if one were

to consider the electric car market as separate and distinct from the traditional automotive market. "The use of monopoly power attained in one market to gain a competitive advantage in another is a violation of §2, even if there has not been an attempt to monopolize the second market. It is the use of economic power that creates the liability." *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980). Respondent has successfully precluded Petitioners' entry into the electric car market and wrongfully smothered competition by using its monopoly power within the traditional automotive industry. It controls 57% of national sales, and purchases substantial volumes of component parts from the battery manufacturers who would otherwise have supplied Petitioners but for Respondent's coercive acts and their fears of loss of Respondent's business. Through the creation of a pseudo-event, i.e. Respondent's "imminent" (6 to 10 years in the future) entry into the market with electric cars, announced nation-wide seventy-two hours before a contemplated similar announcement by Petitioners, Respondent secured for itself, an open field, if as and when it determines it commercially viable to offer the American public the long awaited electric car.

To the extent its actions may be considered an "attempt to monopolize," Respondent's actions would violate Section 2 of the Sherman Act. In such case, the Circuits are divided as to whether the relevant market needs to be defined at all. *Lessig* v. *Tidewater Co.*, 327 F.2d 459 (9th Cir.), reh. denied, 327 F.2d 478 (9th Cir.), cert. denied, 377 U.S. 993 (1964) (relevant market need not be defined); *United States* v. *Pfizer & Co.*, 245 F. Supp. 737 (E.D.N.Y. 1965) (contra). This conflict should be resolved by the Supreme Court.

Fourth: The limits of summary judgment procedure have been so seriously ignored, that this Court, in the exercise of its supervisory power, should forbid such encroachments on the right of trial by jury. In granting summary judgment, the Courts below have effectively determined that the denials contained in the

affidavits offered by Respondent are entitled to greater credence than the contrary testimony offered by Petitioners. Such determination precludes a jury from observing the demeanor of each witness, during direct examination and cross-examination, and further precludes Petitioners from offering additional and rebuttal testimony at trial, to be considered by a jury in determining which of the witnesses' conflicting testimony, as to critical events and conversations, is credible. *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464, 473 (1962).

Dale Bailey, a former employee of General Battery, from whom Respondent secured a denial affidavit, stated to Romer, in the presence of two witnesses:

> "You have no idea how powerful General Motors is. It would make your hair stand on end if you knew what they are capable of. Let me tell you something. They hate the concept of the electric car. They don't want any part of it. Anything they can do to sabotage it, they would do. I've heard stories that you wouldn't believe. They are really unscrupulous."

The denial affidavits were accepted, as fact, by the Courts below in concluding that Respondent had no involvement in the affairs of Petitioners, and did not influence suppliers and banks to refuse to deal with Petitioners. These affidavits establish only Respondent's power to coerce. The lower Courts improperly failed to consider the competing inferences to be drawn from the contradictory testimony and affidavits "in the light most favorable to the party opposing the motion [for summary judgment]." *United States* v. *Diebold*, 369 U.S. 654, 473 (1962). It imposed an unreasonable and insurmountable burden upon Petitioners. Numerous conspiratorial acts having been shown, the quantum of evidence required to connect Respondent with the events is slight. *United States* v. *Morgan*, 118 F. Supp. 621 (S.D.N.Y. 1953).

The failure is particularly clear from the determination that there was no basis for finding a contract between AMC and Petitioners on or about July 27, 1979. The most convincing proof of a contract offered to the District Court, not even discussed in its decision, is the Letter of Intent prepared by Petitioners on June 11, 1979 setting forth all material terms of the Solargen-AMC contract. *On July 28, 1979, William Bain executed the Letter of Intent on behalf of AMC. Two weeks later, on or about August 14, a more formal agreement was signed by AMC,* virtually identical to that signed on October 1, by the same person. (61a-69a, 673a-683a, 789a-791a, 807a). The only significant differences between the two, were the addition of a provision for reciprocal exclusivity and the unconscionable price increase. Prior to committing Petitioners to a production schedule, on July 28, 29 and 30, 1979, Romer prepared projected financial statements on the basis of the $3,000.00 per glider figure, and thereafter on August 3, 1979, a Letter of Authorization constituting a *firm order* obligating Petitioners to purchase, and AMC to sell, fifty units in September, 100 units in October, and 200 Units in November of 1979. (850a, 861a, 862a). This schedule was agreed to by AMC and set forth in their Intra-Company Correspondence dated July 31, 1979 (669a-672a) and circulated to *all* persons at AMC required to approve the agreement with Petitioners. (668a-683a).

As the annual gross sales of AMC's Engines and Component Sales department for 1979 was approximately three million dollars ($3,000,000), and Petitioners contemplated a minimal purchase of 3,000 gliders for approximately nine million dollars ($9,000,000), a jury might reasonably infer that AMC was coerced by Respondent to act against its economic interests and breach its contract with Petitioners. (1314a-1315a). *Oreck* v. *Whirlpool,* 639 F.2d 75 (2d Cir. 1980), cert. denied, 102 S.Ct. 639 (1982).

The conspiratorial and unlawful conduct of Respondent can further be inferred from the acknowledged, unsolicited offer by

AMC's Robert Swaim to purchase for and furnish to Petitioners, deep traction lead acid batteries which Petitioners had been unable to secure as a result of Respondent's coercive actions. Although Swaim testified that this offer was made to further the business interests of AMC, such claim is beyond credulity. Swaim had never before sold, or solicited the sale of, a single deep traction lead-acid battery. (828a-832a). As a minimum the conflicting testimony as to motive raised a genuine issue of fact to be determined by a jury at trial.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

STEVEN J. ROMER
Counsel for Petitioners
18 East 48th Street
New York, New York 10017
(212) 753-3400

STEVEN J. ROMER
EVELYN F. COHN
Of Counsel

Dated: August 16, 1982